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No. 86-233

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF LAWTON, OKLAHOMA,
a municipal corporation;
STEVEN WERTZ; and KENT DUNEGAN,
Petitioners,

v.

SOLOMON LUSBY;
VAUGHN LUSBY; and ALVIN JERARD LUSBY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the City of Lawton may seek this Court's review of a jury verdict by erroneously characterizing the basis for the appellate court's opinion as a finding of harmless error?

2. Whether the City of Lawton may now seek this Court's review of a jury verdict by claiming an instruction given to the jury was improper, despite its complete failure to object to the instruction at trial or before the appellate court and in the total absence of any "plain error"?

3. Whether the City of Lawton may seek reversal of a jury verdict which was premised on articulated findings of violations of state statutes, absent any claim by the City of Lawton that those findings were invalid?

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INTRODUCTORY STATEMENT

Petitioners, in their Introductory Statement, misstate the reasoning and basis for the July 16, 1986 opinion of the United States Court of Appeals for the Tenth Circuit. That misstatement must be corrected.

On November 23, 1984, the United States Court of Appeals for the Tenth Circuit affirmed jury verdicts in favor of all respondents against all petitioners. *Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984). Petitioners then petitioned this Court for a writ of certiorari. This Court vacated the lower court's opinion and ordered the appellate court to further consider its opinion in light of this Court's intervening decision in *City of Oklahoma City v. Tuttle*, 471 U.S. __, 105 S.Ct. 2427 (1985). Although this Court did

not specifically articulate its reasons, it is clear that the question remanded to the court below was whether an instruction given by the trial court relating to municipal liability could be the basis, in this case, for a reversal of the jury verdict.

After further consideration, the court below, in accordance with the principles of Rule 51 of the Federal Rules of Civil Procedure, held that, because the City of Lawton failed at trial to object to the jury instruction and because there was no plain error occasioned by the instruction, the City of Lawton was not entitled to a new trial.

The City of Lawton now petitions this Court, erroneously claiming the appellate court found the giving of the instruction "harmless error." To the contrary, the court below held it did not need to reach the "harmless error" issue because the City of Lawton's failure to object to the instruction in light of all the facts and circumstances of the case precluded its questioning of the instruction on appeal. Because the analysis of the court below was legally correct and because petitioner does not take issue with the lower court's factual analysis, the petition for certiorari must be denied.[1]

COUNTERSTATEMENT OF THE CASE

Because the petitioners failed to completely articulate the evidentiary premise on which the jury verdict and appellate affirmance against the City of

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[1] The petition to this Court is also filed on behalf of police officers Steven Wertz and Kent Dunegan, who were individually found liable to respondents. The petition, predicated solely on the question whether the giving of an instruction on municipal liability is grounds for review, articulates no grounds for the granting of the petition as to Wertz and Dunegan. Thus, the petition must be denied as to them.

Lawton was based, respondents provide this statement of the case.[2]

On July 6, 1979, Vaughn, Solomon and Alvin Lusby stopped at a T.G.&Y. Stores, Inc. store ("T.G.&Y.") located on Sheridan Road in Lawton, Oklahoma and purchased a pair of sunglasses for Vaughn. Charles Gent ("Gent"), an off-duty Lawton police officer employed by T.G.&Y. as a security guard, stopped Vaughn outside the store and asked him if he had a receipt for the sunglasses. Vaughn explained that he had paid for the sunglasses but that he did not have a receipt. Gent showed Vaughn his Lawton Police Department badge, told him he was a Lawton police officer working as a security guard and that Vaughn was under arrest for shoplifting. (Tr. 23-25). Vaughn immediately suggested they go back inside the store to clear up the matter. Vaughn, Alvin and Solomon Lusby, after a scuffle in which Gent drew a derringer pistol, proceeded to the back of the store.

In a few minutes two Lawton police officers, Steve Wertz and Kent Dunegan, arrived at the store and took the Lusby brothers into custody. (Tr. 44). Pursuant to the official, stated Lawton Police Department policy (Tr. 1219), no questions were asked and there was no independent investigation by the police officers. Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them, took them to jail, and put them in cells without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word to affect the arrest before he had even completed the citizen's arrest form. (Tr. 44-47, 638, 1484-87).

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[2] References to the trial transcript will be identified by (Tr. ____).

Alvin Lusby had requested that his handcuffs be placed in front because of an injured shoulder but his request was refused. (Tr. 46, 47). The fact that he had moved his handcuffs without approval of one of the officers obviously angered Officer Wertz when they arrived at the Lawton police station and he realized what had happened. (Tr. 53). There was evidence that Wertz intentionally and maliciously hit Alvin in the face with his fist and pushed him head first into a brick wall on the way into the jail area. (Tr. 53, 54, 219, 382). The testimony was reinforced by other evidence of Wertz' violent propensities as a police officer. (Tr. 1101-1104, 1135-1192, 1200-1201). There was no evidence that Officer Dunegan took any action to stop the actions of Wertz. The Lusby brothers were finally booked and charges filed against them for assault and battery, resisting arrest, disobeying a lawful order, shoplifting, possession of marijuana, and assault and battery on a police officer (Pl. Exh. 8, 9, 10) after Gent appeared at the station to fill out his arrest forms.

Seven months later, on February 27, 1980, Lawton dropped all charges against the Lusbys. (Tr. 657). For seven months Lawton never investigated the incidents charged against the Lusby brothers or, if it did, it left the charges pending despite overwhelming evidence that no shoplifting occurred. Lawton, through its city prosecuting attorney, also demanded from the Lusby brothers a release of civil liability before it would drop the charges. (Tr. 1361). This demand was articulated official policy; it was required of Larry Mallory, another arrestee beaten by Wertz, prior to the dropping by Lawton of charges filed against him. (Tr. 1189-90).

This case was filed on June 23, 1980. The trial began on September 16, 1981. The jury verdict in favor of the Lusby brothers was rendered on October 1, 1981.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS ON REMAND WAS PROPER IN ALL RESPECTS.

A. The Court Below Correctly Held That, In The Absence Of Plain Error, The City Of Lawton's Failure To Object To An Allegedly Improper Jury Instruction Precluded Its Raising The Issue On Appeal.

As the United States Court of Appeals for the Tenth Circuit noted in its recent opinion, Lawton did not even raise the question whether the challenged jury instruction was improper until its earlier petition to this Court. *Lusby v. T.G.&Y. Stores, Inc.*, ___ F.2d ___, Nos. 82-1721, 82-1779, slip op. at 7 (July 16, 1986). To the contrary, Lawton specifically stated it had no objection to the instructions given at trial (Tr. 1635) and merely claimed insufficiency of the evidence on appeal (Brief of Lawton on Appeal, pp. 27-30). This failure to even obliquely object until its earlier petition for a writ of certiorari required this Court to remand for consideration by the court below whether this failure precluded the raising of the improper instruction on appeal. The court has now directly considered this question and, using the appropriate "plain error" analysis, determined that no "plain error" existed which would necessitate reversal of the jury verdict. That decision is undeniably correct.

Lawton does not argue that the court below was *wrong* when it determined that there was no Rule 51 "plain error" but erroneously characterizes the basis of the court's opinion as a finding of "harmless error." Lawton further argues that, simply because this

Court granted the earlier petition for a writ of certiorari and remanded to the court below for further consideration in light of *Tuttle,* the court below was somehow precluded from applying, on remand, the appropriate Rule 51 "plain error" analysis. These arguments are simply unpersuasive. The court below articulated that it was not relying on any "harmless error" analysis. Rather, the appellate court, after setting forth Lawton's abject failure to object to the jury instruction, the respondents' raising of the Rule 51 issue at the earliest possible time, and the requirement of this Court's remand, stated:

> We need not decide whether harmless error analysis applies, however, because the city did not object to the "single incident" instruction at trial. Ordinarily, unless objection to a faulty instruction is made before the jury retires, error may not be found later. . . .
>
> . . . .Here there also was no objection to the faulty instruction at trial. But unlike *Tuttle,* on their appeal to this court the defendants' briefs made no objection to the instruction.[2] Our opinion did not mention the instruction. Rather, the defendant city argued on appeal only that there had not been enough evidence of city employees' misbehavior to establish a policy. *See* Brief of Appellants City of Lawton, Steve Wertz and Kent Dunegan at 27-30. This was an insufficiency of the evidence argument, and we treated it as such. *See Lusby,* 749 F.2d at 1432.
>
> The city's petition for certiorari in the Supreme Court, filed before the Court decided

Tuttle, also made the "single incident" argument as one of sufficiency of the evidence. The jury instruction was mentioned only obliquely in another section of the petition.[3] Plaintiffs' response, filed after *Tuttle* was issued, did argue that the instruction was not properly before the Court, because of the city's failure to object at trial or to raise any error in the instruction before the circuit court. Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari at 11-12. We do not read the Supreme Court's cryptic order remanding for our reconsideration in light of *Tuttle* as a holding that the Rule 51 defect is either waived or inapplicable in this case. There is no point at which we can say that the Lusby brothers' Rule 51 contemporaneous objection argument should have been raised earlier and thus can be regarded as waived. There was no plenary consideration of the instruction's merits, as there was in the circuit court opinion in *Tuttle,* to preclude raising the procedural defect now. The Lusbys again have raised the Rule 51 issue in their briefs on remand. We hold that it is a timely and valid defense to the city's argument that the instruction error warrants a new trial.

[2] The panel does not recall any objection to the instruction at oral argument, which was not recorded.

[3] "However, City begs this Court to read Instruction No. 15 regarding the liability of the City for §1983 claims given at trial (App. E). What were the jury issues on City's liability: negligent training, failure to supervise and police misconduct." Petition for a Writ of Certiorari at 14-15.

Lusby v. City of Lawton, supra, slip op. at 6-8.

The appellate court thus clearly articulated the procedural history and applied the appropriate legal analysis upon its further consideration of the case on remand.

B. Petitioners Do Not Challenge The Factual Basis For The Lower Court's Finding Of No "Plain Error" Rendering This Court's Review Unnecessary.

The court below, relying on apposite judicial authority, reviewed the trial record, determining that in the light of all the facts and circumstances, the "plain error" exception to Rule 51 did not aid Lawton in this case. The court, after articulation of the facts supported by citations to the record, held there simply had been no "miscarriage of justice" demanding reversal. Moreover, Lawton does not even attempt to show this Court any reason why that factual analysis would justify the granting of its petition for a writ of certiorari. To the contrary, there exists no significant federal or constitutional question with respect to the lower court's "plain error" analysis. The factual determination by the court below must be allowed to stand.

II. THIS CASE MERITS NO REVIEW OF THE FINDING OF LIABILITY AGAINST THE CITY OF LAWTON AS THE FINDING ON PENDENT STATE CLAIMS PROVIDES AN INDEPENDENT BASIS FOR AFFIRMANCE OF THE JURY VERDICT.

As Lawton admitted in its petition to this Court, the jury found in favor of respondents on pendent

state claims. The verdicts on those pendent state claims are in no way tainted by the questioned instruction. That instruction applies only to the liability of Lawton as to civil rights violations. Thus, the state law violations by Lawton serve as unchallenged, independent predicates for the jury's finding.

As this Court stated in *Zant v. Stephens*, 462 U.S. 862 (1983), when there is evidence in the record that the verdict did not rest exclusively on an impermissible portion of an instruction, the giving of the instruction need not mandate reversal. *Id.* at 881. When there is no uncertainty that an independent basis existed, affirmance is permitted. *Id.* Here, where the verdict was obtained from sufficient pendent state claims, review is not necessary; the result is clearly correct.

CONCLUSION

Because petitioners do not challenge the factual predicate for the "plain error" analysis as correctly applied by the court below and because the decision below is consistent with apposite rulings in this Court and circuit courts, the petition for a writ of certiorari should be denied with costs, including attorneys' fees, awarded to respondents.

Respectfully submitted,

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